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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
BARRY LAMAR BONDS,
Defendant.

No. CR 07-0732-SI

UNITED STATES'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE LAY TESTIMONY REGARDING SIDE EFFECTS OF STEROIDS

Date: April 6, 2011
Time: 8:30 a.m.
Judge: The Honorable Susan Illston

INTRODUCTION

At the conclusion of the government’s case-in-chief, the defense moved to strike lay and expert testimony on the side effect of anabolic steroids described as “testicular atrophy.”¹ At a hearing on April 6, 2011, the Court stated that it was inclined to grant defendant’s motion.

¹The majority of the defendant's written motion challenged the government's lay and expert testimony on the effects of human growth hormone. Given the Court's tentative ruling to deny that aspect of the motion, the government submits on that issue.

4/6/11 Tr. at 1772. The Court later explained that it did not believe that the government had laid an adequate foundation for government witness Kimberly Bell to testify that she had observed shrinkage in the defendant's testicles while he was using steroids. 4/6/2011 Tr. at 1785. The government submits that it laid a proper foundation for the admissibility of the testimony of its expert, Dr. Bowers, and its lay witness Kimberly Bell, on this topic, especially in light of the defendant's failure to object on foundational grounds when the testimony was offered. The defense motion should accordingly be denied.

FACTS

Testimony of Dr. Larry Bowers

At trial on March 24, 2011, Dr. Bowers testified as an expert on the side effects associated with the use of anabolic steroids. 3/24/11 Tr. at 635-648. Among other side effects, Dr. Bowers described two conditions that can arise with male genitalia as a result of the abuse of anabolic steroids. 3/24/11 Tr. at 641-642. One such side effect is impotence. 3/24/11 Tr. at 641. Another, related side effect of steroid abuse is testicular atrophy. 3/24/11 Tr. at 641. Dr. Bowers testified that it was "well-documented" that anabolic steroids can cause testicular atrophy, and that such a condition would manifest itself through a shrinkage of the testicles. 3/24/11 Tr. at 641. Dr. Bowers was asked whether a scientific device called an orchidometer was necessary to measure the amount of shrinkage in the testicles that might be caused by anabolic steroids. 3/24/11 Tr. at 707. Dr. Bowers acknowledged that he was not certain because that was "not his field," but described the amount of shrinkage as "a little more than a quarter inch," on average, with a possibility of a greater or lesser variance, based on the scientific literature. 3/24/11 Tr. at 707-708.

Testimony of Kimberly Bell

Kimberly Bell testified on March 28, 2011. Bell testified that she was a physically intimate, romantic partner of the defendant from 1994 through 2003. 3/28/11 Tr. at 749. Bell testified that as early as 1993, she stayed at the defendant's Redwood Shores condominium several nights a week. 3/28/11 Tr. at 748-749. She saw the defendant several times a week for

1 years, from 1994 to 1998, and spent “a lot of time together.” 3/28/11 Tr. at 751. Bell stated that
2 she was in love with him. 3/28/11 Tr. at 752. Bell’s intimate relationship with the defendant
3 continued even after the defendant’s marriage to another woman in 1998. 3/28/11 Tr. at 754.

4 In approximately 2000, Bell noticed physical changes in the defendant. 3/28/11 Tr. at
5 763. She testified that he developed acne on his shoulders and back, his hair was falling out
6 quickly, and he ended up “shaving it all off.” 3/28/11 Tr. at 763, 765. She testified the
7 defendant would stand in the mirror and ask if his bloating was “obvious.” 3/28/11 Tr. at 763.
8 She described a specific incident at baseball’s spring training in 2000 in which the defendant had
9 taken a shower, had gotten out, and stood in the mirror and asked Bell if other people would
10 notice the bloating. 3/28/11 Tr. at 764. On this occasion, the defendant directed Bell’s attention
11 to his stomach and abdomen. 3/28/11 Tr. at 764.

12 According to Bell, in 1999 and 2000, the defendant displayed “changes in his sexually
13 [sic] and testicles and performance and things like that.” 3/28/11 Tr. at 763. Bell’s testimony as
14 to the changes in the defendant’s testicles was as follows:

15 Q. You mentioned something about his testicles, and you’re not a doctor, right, Ms. Bell?

16 A. No, I’m not.

17 Q. You’re not a medical expert on things, correct?

18 A. Correct, I’m not.

19 Q. But you were the defendant’s intimate partner for a number of years; is that correct?

20 A. Yes.

21 Q. And you seen different [sic] in terms of his testicles and his penis area?

22 A. Yes.

23 Q. How so?

24 A. The shape, size of his testicles were smaller, unusual different shaped. And he had
25 trouble keeping erection and tried some things to resolve that and that’s not something we
26 experienced before.

27 Q. So seemed different to you?

1 A. Yes.

2 3/28/2011 Tr. at 765. The defendant did not object to the government's foundation for Bell's
3 testimony either during her testimony or afterward. Moreover, although the defendant cross-
4 examined Bell about prior statements she had made about the amount of shrinkage in the
5 defendant's testicles caused by steroids, the defendant did not question Bell about her
6 opportunity to observe the results of steroid use on the defendant's testicles. *See* 3/28/2011 Tr. at
7 965-66.

8 In her 2005 grand jury testimony, Bell had stated that the defendant's testicles shrunk.
9 3/17/05 GJ Tr.at 38. She said, "It's an awkward thing I guess, but in shrinking I don't know if
10 you can describe the size of shrinking, half the size they were before." 3/17/05 GJ Tr. at 38.
11 When asked about the "half the size" characterization on cross-examination at trial, Bell
12 acknowledged this estimate was inaccurate. 3/28/11 Tr. at 966. She acknowledged that she had
13 also described the defendant's testicles as "shriveled up" in a Playboy interview. 3/28/11 Tr. at
14 966. When asked on re-direct at trial to explain her statements in the grand jury, Bell explained
15 that "I was searching for a way to describe it. I couldn't – it was hard to put it into words. It's
16 hard to talk about at all." 3/28/11 Tr. at 985. After reviewing the passage of he grand jury
17 testimony, Bell stated that "it was hard to describe." 3/28/11 Tr. at 987. She said, "[a]nd I said it
18 shrunk," and stated that her grand jury testimony was her "best estimate." 3/28/11 Tr. at 987.

19 ARGUMENT

20 Bell's Nine-Year Intimate Relationship Established An Ample Foundation For Her 21 Testimony Regarding The Defendant's Testicles

22 The defense motion to strike this testimony is without a sound factual or legal basis. This
23 matter was extensively litigated prior to the trial. The government proffered a declaration from
24 Dr. Larry Bowers that testicular atrophy was a side effect of steroid abuse. He testified to that fact
25 at trial. Kimberly Bell submitted a declaration in which she said that the defendant's testicles
26 shrank. She testified to that fact at trial. The government's trial proof comported with its proffer,
27 and fully satisfied the Court's pretrial rulings regarding the admissibility of this testimony.

1 The defense cites to Bell's acknowledgment that she was not accurate in her grand jury
2 testimony as a basis to strike the testimony. Her full statement in the grand jury, however, as well
3 as her statements at trial, could not be clearer in demonstrating that Bell was providing her best
4 estimate as to the amount of testicular shrinkage in her grand jury testimony. Her statement that
5 the estimate was not accurate was a candid statement that she could have been wrong in that
6 estimate, not an instance of falsity designed to mislead. Notably, she had not repeated that
7 characterization of "half the size" in her pretrial declaration or in her direct testimony. In any
8 event, inconsistencies between Bell's trial and grand jury testimony bear on her credibility, not the
9 admissibility of her testimony.

10 The defense further suggests that the testimony should be stricken based upon its assertion
11 that a difference of 1/4 inch—the change in testicular size described by Dr. Bowers—is too small to
12 be detected without a scientific instrument. This assertion is conclusory and lacks any factual
13 basis. An intimate partner in a nine-year relationship could certainly be sufficiently familiar with
14 a partner to notice small changes in their partner's physique.

15 Finally, Bell's testimony on testicular shrinkage should not be stricken because the
16 government failed to lay a proper foundation, as the Court suggested on April 5, 2011. When the
17 government elicited that testimony, the defendant did not object that the government had laid an
18 adequate foundation through Bell's testimony (and has not argued in its current motion that the
19 government failed to lay a proper foundation). Had the defendant objected at trial, the
20 government would, of course, have elicited a more detailed foundation. *See Bartleson v. United*
21 *States*, 96 F.3d 1270, 1278 (9th Cir. 1996) (failure to raise foundational objection denied
22 government the opportunity to lay a better foundation); *United States v. Foster*, 711 F.2d 871, 877
23 (9th Cir. 1983) ("An objection would have afforded the government an opportunity to present
24 whatever evidence was available to lay a foundation for the admission of" challenged evidence).
25 Moreover, the government plainly sought to avoid inquiring further into intimate details of Bell's
26 and the defendant's sex life in order to provide a more detailed foundation. In light of the subject
27
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1 matter of the testimony, and the defendant's failure to object, the Court should not exclude Bell's
2 testimony because the government failed to lay a proper foundation.

3 In any event, the government's foundation was adequate. There is no dispute that Bell and
4 the defendant maintained a long-term, intimate, sexual relationship between 1994 and 2003. The
5 existence of such a relationship establishes an adequate foundation for this witness to testify
6 regarding the defendant's physique. Bell's testimony established that she was intimately familiar
7 with the defendant's body, that she saw him get out of the shower, that he asked her to look at his
8 body, and that she noticed details of various parts of his body above and beyond his genitalia. Her
9 testimony established a familiarity with the defendant's intimate body parts as a long-time sexual
10 partner which provides her with an ample foundation to testify regarding this topic.

11 In addition, the defense is of course free to argue all of these points in closing argument as
12 a means of attacking Bell's credibility. Whether the defense has established these points
13 meaningfully is a question for the jury. The defense has failed, however, to provide a factual or
14 legal basis to strike the testimony. The defendant's motion on this point should accordingly be
15 rejected.

16 CONCLUSION

17 For the above-stated reasons, the government respectfully requests that the motion to strike
18 the lay and expert testimony on testicular atrophy be denied.

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20 DATED: April 5, 2011

Respectfully submitted,

21 MELINDA HAAG
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22 /s/

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